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Kenneth J. Murphy, Clerk
CINCINNATI, OHIO

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RONALD MELTON, et al., : NO. C-1-01-528
Plaintiffs, :
v. : **ORDER**
BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO, et al., :
Defendants. :

Judge 4812
Mag.
Journal
Issue CMTC
Docketed jw

This matter is before the Court on the Magistrate Judge's Report and Recommendation (doc. 38), the Objection by Defendants Tom Neyer, Jr., John S. Dowlin, Todd Portune, and Robert Pfalzgraf, M.D. (doc. 39), the Objection by Defendant Carl L. Parrot, Jr. (doc. 40), and Plaintiffs' Reply to Defendants' Objection (doc. 45).

BACKGROUND

This case is brought by the surviving siblings of Perry Melton, who died November 9, 2000 (doc. 16). Plaintiffs state that after his death, the body of Perry Melton was entrusted to the care and custody of Hamilton County, Ohio, through its county morgue (Id.). Plaintiffs allege that the Hamilton County Defendants granted Defendant Thomas Condon, a photographer, access to the body of their brother and allowed Mr. Condon to take photographs of his body for commercial purposes (Id.). Plaintiffs specifically allege that Defendant Condon "photographed, posed, touched, manipulated, came into possession of photographs, and/or otherwise abused and/or

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violated the corpse of the decedent, Perry Melton, for purposes of commercial exploitation" (Id.). Plaintiffs bring this action under 42 U.S.C. § 1983 raising federal constitutional due process and equal protection claims against numerous Defendants including but not limited to the following officials or employees of Hamilton County, Ohio: Carl L. Parrot, Jr. M.D., Coroner for Hamilton County, Robert Pfalzgraf, M.D., Deputy Coroner for Hamilton County, and John S. Dowlin, Todd Portune, and Tom Neyer, Jr., members or former members of the Hamilton County Board of Commissioners. Plaintiffs also raise Ohio common law claims including negligence, intentional infliction of emotional distress (hereinafter "IIED"), negligent infliction of emotional distress (hereinafter "NIED"), and invasion of privacy. Plaintiffs further seek Declaratory Judgment finding that Ohio's sovereign immunity statute violates Article I, Section 16 of the Ohio Constitution.

THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

In the September 3, 2002 Report and Recommendation, the Magistrate Judge considered numerous motions including Hamilton County Defendants' Motion to Dismiss in Part Plaintiffs' First Amended Complaint, which attacked Plaintiffs' pendent state common law claims (doc. 7), Plaintiffs' Motion to Certify Question of Constitutionality of Immunity Defense to Ohio Supreme Court (doc. 26), and Motion to Dismiss of Defendant Ohio Attorney General Betty D. Montgomery (doc. 29). The Magistrate Judge found that Plaintiffs have stated a claim against the Hamilton County Defendants for NIED, but opined that Plaintiffs have not stated a "traditional" negligence claim, because they have not alleged any physical injury (doc. 38).

In arriving at his conclusion that Plaintiffs have stated a viable NIED claim, the Magistrate Judge cited dicta of the Ohio Supreme Court in Heiner v. Moretuzzo, 73 Ohio St.3d 80,87 n.3 (1995) that acknowledged without disapproval that Carney v. Knollwood Cemetery Ass'n., 33 Ohio App.3d 31,35 (8th App. Dist 1986) provided an exception to the bystander rule for such a claim in case involving the abuse of a corpse (Id.).

The Magistrate Judge next found that sovereign immunity applies to political subdivision immunity for intentional torts so that the Hamilton County Defendants are immune from Plaintiffs' Ohio common law claims to the extent they are based upon wrongdoing (Id.). Similarly, the Magistrate Judge found that Plaintiffs may not recover punitive damages because Ohio Rev. Code § 2744.05 bars such recovery (Id.). The Magistrate Judge found that Section 2744.05 does not violate Article VI, Section I of the Ohio Constitution (Id.). Further, according to the Magistrate Judge, under Ohio common law, the Plaintiffs' Motion to Certify the question of its constitutionality or to otherwise challenge the constitutionality of Section 2744 lacks merit (Id.). Finally, the Magistrate Judge found that Plaintiffs' Invasion of Privacy Claim fails as a matter of law, and that Plaintiffs' Complaint against Defendant Betty Montgomery, then-Attorney General of the State of Ohio, fails for not raising any specific allegations against her (Id.).

Consequently, the Magistrate Judge recommended that the Hamilton County Defendants' Motion to Dismiss be granted in part--1) as to Plaintiffs' claims for traditional negligence, including negligence per se, 2) as to Plaintiffs' claims for IIED, 3) as to Plaintiffs' claims for invasion of privacy, and 4) as to Plaintiffs' claims for punitive damages (Id.). The Magistrate Judge, however, recommended that the Hamilton County Defendants' Motion to Dismiss be denied in part, stating that Plaintiffs' claims for NIED against the Hamilton County Defendants should not be dismissed, because Plaintiffs have pled sufficient facts to state a claim for relief (Id.). The Magistrate Judge also recommended that Plaintiffs' Motion to Certify be denied, that Plaintiffs' claim for declaratory judgment that Chapter 2744 of the Ohio Revised Code violates the Ohio Constitution be denied, and that the Motion to Dismiss of Ohio Attorney General Betty Montgomery be granted (Id.). Finally, the Magistrate Judge recommended that Plaintiffs' Motion to Strike Defendant Montgomery's Motion to Dismiss be denied, that Hamilton County Defendants' Motion to Strike and Alternative Motion be denied as moot, and that Defendant Parrott's Motion to Strike and Alternative Motion to File Surreply be denied as moot (Id.).

DEFENDANTS' OBJECTIONS AND PLAINTIFFS' REPLY

The Defendants filed identical Objections (docs. 39 & 40) to the Magistrate Judge's Report and Recommendation, objecting only to the extent that Defendants' Motion to Dismiss be denied as to Plaintiffs' claim for NIED. Defendants argue, citing High v.

Howard, 64 Ohio St.3d 82 (1992), that under Ohio law, a claim for NIED is limited to such instances where one was a bystander to an accident or was in fear of physical consequences to his own person (Id.). Defendants acknowledge a lack of Ohio Supreme Court precedent on the question of whether the alleged mishandling of dead bodies could constitute an exception to the bystander rule, but cite to the Seventh District of the Ohio Court of Appeals decision in Audia v. Rossi Brothers Funeral Home, Inc., 140 Ohio App. 3d 589 (Ohio App. 7th Dist. 2000) for the proposition that such an exception is unlikely (Id.). Defendants object to the Magistrate Judge's interpretation of the dicta in Heiner, 73 Ohio St. 3d at 89, fn. 3,(1995) and reliance on Carney, 514 N.E. 2d 430 (1986) as incorrect in the light of Audia (Id.). Audia, argues Defendants, clarifies that the facts of Carney involved intentional acts rather than negligent acts, and thus is improperly invoked as precedent to carve out an exception to the NIED bystander rule (Id.).

Plaintiffs' Reply to Defendants' Objection argues that the plain language of the Ohio Supreme Court itself in Heiner, describes Carney as a case "permitting recovery for negligent infliction of emotional distress where defendants were responsible for desecration of a grave" 73 Ohio St. 3d at 89 fn. 3 (doc. 45). Plaintiffs argue that the Ohio Supreme Court clearly was aware that Carney dealt with NIED as opposed to IIED, had the opportunity to disapprove of the viability of such a cause of action in Ohio, and chose not to do so (Id.). As such, argues Plaintiffs, Defendants'

Objection that there is no exception to the bystander rule for the mishandling of dead bodies, should be overruled (Id.).

Plaintiffs did not object to the Magistrate Judge's other findings that effectively dismissed their various other claims (Id.). However, Plaintiffs requested clarification as to whether the Court recognizes a state claim for the exploitation of Plaintiffs' sibling's photograph for a commercial purpose without due compensation, contrary to the Ohio Constitution (Id.).

DISCUSSION

The Court has reviewed the Magistrate Judge's Report and Recommendation and finds that this case involves issues of state law that are novel. For example, in contrast to the Magistrate Judge, the Court finds that Defendant Condon's alleged conduct could constitute a wrongful intrusion into the family's privacy in such a manner as to cause mental suffering to a person of ordinary sensibilities. Many people consider issues of death and the care of their loved ones' remains as private matters. Some families have private funerals for their loved ones. Most people would not consider the corpses of their loved ones' as fair game, without permission, for a stranger's photography project. Defendant Condon's conduct could very well be considered outrageous. It is for this reason that the Court shall maintain jurisdiction over the Section 1983 claim based upon a violation of substantive due process by actions that "shock the conscience." Braley v. City of Pontiac, 906 F.2d 220, 224-25 (6th Cir. 1990); Culberson v. Doan, 125 F. Supp. 2d 252, 267 (S.D. Ohio, 2000).

However, the Court finds that Plaintiff's pendent state law claims involve novel issues of Ohio state law that are properly within the domain of the state courts. Pursuant to 28 U.S.C. § 1367(c)(1), the Court therefore declines to exercise supplemental jurisdiction over Plaintiffs' state law claims. The facts of this case are such that this is a case of first impression. As such, the Court finds that all of the Plaintiffs' pendent state law claims, including a state claim for the exploitation of the photograph of their deceased brother for commercial benefit, for invasion of privacy, a traditional negligence claim, an IIED claim, a NIED claim, and a punitive damages claim should be dismissed without prejudice.

CONCLUSION

In summary, the Court finds that Plaintiffs' pendent state law claims should be dismissed as the facts of this case present novel issues of Ohio state law. As such, the Court will not reach the question of Plaintiffs' claim that Chapter 2744 of the Ohio Revised Code violates the Ohio Constitution nor certify such issue to the Ohio Supreme Court. The Court shall continue to exercise jurisdiction over Plaintiffs' Section 1983 Claims against the Hamilton County Defendants and Defendants Condon and Tobias.

Proper notice was provided to the Parties under Title 28 U.S.C. § 636(b)(1)(C), including the notice that they would waive further appeal if they failed to file an objection to the Magistrate Judge's Report and Recommendation in a timely manner. See United States v. Walters, 638 F.2d 947, 949-50 (6th Cir. 1981).

Having reviewed this matter de novo, pursuant to Title 28 U.S.C. § 636, the Court concludes that the Magistrate Judge's Report and Recommendation should be affirmed in part, but rejected as to all of Plaintiffs' state law claims which shall be dismissed without prejudice. Accordingly, the Court REJECTS the Magistrate Judge's Report and Recommendation (doc. 38) as to all of Plaintiffs' supplemental state law claims, which the Court DISMISSES without prejudice. The Court AFFIRMS the Magistrate Judge's recommendations that Plaintiffs' Motion to Strike Defendant Montgomery's Motion to Dismiss be DENIED, that Hamilton County Defendants' Motion to Strike and Alternative Motion be DENIED as moot, and that Defendant Parrott's Motion to Strike and Alternative Motion to File Surreply be DENIED as moot (Id.). Finally, pursuant to 28 U.S.C. § 636(c)(4), the Court VACATES its October 11, 2001 Order (doc. 4) referring this matter to the Magistrate Judge, and SETS this matter for preliminary pretrial conference at 9:30 a.m. on February 6, 2003.

SO ORDERED.

Dated: 12/10/02

S. Arthur Spiegel
United States Senior District Judge